In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1230

SANFORD A. SCHAFITZ, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner seeks review of an order of the court of appeals (Pet. A–1) dismissing without opinion his appeal from an order by a hearing examiner of the Federal Communications Commission (Pet. 8–10) denying his application to intervene in a hearing on applications for a radio station in Lorain, Ohio. We submit that the court below acted correctly, that no issue of general importance is presented, and that further review of this case is not warranted.

On March 25, 1964, the Commission denied the application of WWIZ, Inc. for renewal of the license of radio station WWIZ at Lorain, Ohio, and also denied a separate application for transfer of control of WWIZ from Sanford A. Schafitz to the Lorain Journal Company. *WWIZ, Inc.*, 36 F.C.C. 561, rehearing

262-029—67

denied, 37 F.C.C. 685. After extensive administrative proceedings, the Commission concluded that the activities of Schafitz and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission, in violation of the Communications Act and of the Commission's rules; and that Schafitz's filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission. The court below held that the Commission's findings were supported by substantial evidence, and affirmed. *Lorain Journal Co.* v. *Federal Communications Commission,* 351 F. 2d 824 (C.A.D.C.). This Court denied WWIZ's petition for a writ of certiorari on April 4, 1966, 383 U.S. 967, and on May 16, 1966, denied its petition for rehearing, 384 U.S. 947.

On May 19, 1966, the Federal Communications Commission invited applications for authority to construct and operate a standard broadcast station at Lorain, Ohio to replace the station previously operated by WWIZ. Petitioner tendered such an application, but the Commission returned it because it was substantially identical to the denied renewal application and was therefore repetitious within the meaning of Section 1.519(a) of the Commission's rules, 47 CFR 1.519(a). The Commission denied reconsideration of this action, and on March 9, 1967, its order was affirmed *per curiam* by the court below.[1] *Schafitz* v. *Federal Communications Commission,* C.A.D.C. No. 20721.

[1] The text of the court's order is appended hereto, *infra*, p. 5.

In the meantime, the Commission designated for comparative hearing those applications which had been accepted for filing. On October 17, 1966, Schafitz attempted to intervene in the proceeding (Pet. 6) and to have the hearing postponed. Under the Commission's rules, such petitions are considered by the hearing examiner. 47 CFR 0.341, 1.223(b). The examiner denied Schafitz's request because he found no basis for Schafitz's intervention in view of the return of his earlier application (Pet. 8–10).

The Commission's rules provide that appeals from adverse actions of a hearing examiner may be taken to reviewing authorities within the Commission. 47 CFR 0.365, 1.115, 1.301. Specifically, the Commission's Review Board[2] is empowered to act on appeals from rulings of the hearing examiner in adjudicative proceedings. Additionally, applications for review of the Board's action may be taken to the Commission itself. Schafitz did not avail himself of these procedures, but instead appealed directly to the court below. He also failed to move the Commission for a postponement of the hearing date, but instead filed a motion for such relief directly in the court of appeals. The Commission opposed the motion to postpone and moved to dismiss the appeal on the ground that Schafitz had failed to exhaust his administrative remedies. The court denied the motion to postpone and dismissed the appeal (Pet. A–1).

It is clear that an administrative remedy was readily available whereby review of the examiner's action could have been obtained. In view of Schafitz's

[2] Established pursuant to 47 U.S.C. 155(d).

failure to follow this course, the court below was clearly correct in dismissing the appeal. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50–51; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 284–285 (C.A.D.C.), *certiorari denied*, 305 U.S. 625. See, also, *Spanish International Broadcasting Co.* v. *Federal Communications Commission*, No. 20326, decided April 18, 1967, Slip Op., pp. 15–19 (C.A.D.C.).[3]

By failing to exhaust his administrative remedies, moreover, petitioner denied the Commission an opportunity to rule upon the matter of his intervention. It is well settled that questions which the agency has not been asked to decide will not be considered by a reviewing court. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155. The Federal Communications Act expressly so provides. 47 U.S.C. 155(d)(7), 405. See, also, *Florida Gulfcoast Broadcasters, Inc.* v. *Federal Communications Commission*, 352 F. 2d 726, 727–728 (C.A.D.C.).

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

MAY 1967.

---

[3] Petitioner errs in stating (Pet. 11) that review of non-final orders may be had under 47 U.S.C. 402(a). That section provides that review proceedings shall be controlled by the Judicial Review Act of 1950 which expressly limits the jurisdiction of the court of appeals to "final orders." 28 U.S.C. 2342 (1966).

APPENDIX

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1966

No. 20721

SANFORD A. SCHAFITZ, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Before: DANAHER, BURGER, and WRIGHT,
Circuit Judges, in Chambers

Order

On consideration of appellee's motion to affirm and of appellant's opposition thereto, it is

ORDERED by the court that the appellee's aforesaid motion be granted and the order of the Federal Communications Commission on appeal herein is affirmed. See *Public Service Television, Inc.* v. *FCC*, 115 U.S. App. D.C. 200, 317 F. 2d 900 (1962).

Per Curiam.

U.S. GOVERNMENT PRINTING OFFICE: 1967